STATE OF MICHIGAN

COURT OF APPEALS

ANDREW HORNING and JACQUELINE HORNING, Plaintiffs-Appellees/Cross-Appellants,	UNPUBLISHED January 3, 2003
v LAPEER COUNTY DRAIN COMMISSIONER and FIEDOR FERRIS DRAIN DRAINAGE DISTRICT, Defendants-Appellants/Cross-Appellees.	No. 229054 Lapeer Circuit Court LC No. 97-024987-CZ

Before: O'Connell, P.J., and White and B. B. MacKenzie*, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment, following a jury trial, awarding plaintiffs $17,000 on their trespass-nuisance claim and from the denial of their motion for judgment notwithstanding the verdict. Plaintiffs cross-appeal, challenging the trial court's grant of a directed verdict on their inverse condemnation claim, the court's instruction on damages and the court's denial of expert witness fees. At argument, plaintiffs restricted their request for affirmative relief to the expert fee issue. We affirm the judgment and reverse the trial court's denial of expert witness fees for Michael Robinson.

I

Several of defendants' arguments regard *Hadfield v Oakland County Drain Commr*, 430 Mich 139; 422 NW2d 205 (1988), and the viability of the trespass nuisance exception to the governmental tort liability act. During the pendency of this case, the Supreme Court decided *Pohutski v Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), overruling *Hadfield*, *supra*.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Pohutski held that the governmental tort liability act, MCL 691.1407(1),[1] does not provide an exception from immunity for trespass-nuisance claims against political subdivisions.[2] However, *Pohutski* was given prospective application only, to cases brought on or after April 2, 2002. *Id.* at 699. This action was filed before that date, thus pre-*Pohutski* law applies.

Defendants' argument that plaintiffs had to show negligence to establish a cause of action under the trespass-nuisance exception fails. In the pre-*Pohutski* case of *Peterman v Dep't of Natural Resources*, 446 Mich 177, 205 n 42; 521 NW2d 499 (1994), the Supreme Court stated that negligence is not a necessary element of an action under the trespass-nuisance exception to governmental immunity. See also *CS&P Inc v Midland*, 229 Mich App 141, 145; 580 NW2d 468 (1998).

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[1] MCL 691.1407(1) provides:

> Except as otherwise provided in this act, a *governmental agency* is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the *state* from tort liability as it existed before July 1, 1965, which immunity is affirmed. [Emphasis in *Pohutski, supra* at 684.]

The *Pohutski* Court noted:

> Under a plain reading of the statute, then, the first sentence of § 7 applies to both municipal corporations and the state, while the second sentence applies only to the state. [465 Mich at 685.]

[2] MCL 691.1401(b) defines "political subdivision" as:

> . . . a municipal corporation , county, county road commission, school district, community college district, port district, metropolitan district, or transportation authority or a combination of 2 or more of these when acting jointly' a district or authority authorized by law or formed by 1 or more political subdivisions; or an agency, department, court, board or council of a political subdivision.

The term "State" is defined in MCL 691.1401(c) as:

> . . . the state of Michigan and its agencies, departments, commissions, courts, boards, councils, and statutorily created task forces and includes every public university and college of the state, whether established as a constitutional corporation or otherwise.

The term "governmental agency" is defined as "the state or a political subdivision." MCL 691.1401(d).

II

Defendants also argue that plaintiffs' failure to present testimony from a qualified engineer resulted in lack of an evidentiary foundation and precluded a jury verdict in plaintiffs' favor on the trespass-nuisance claim. We disagree.

The trial court's opinion denying defendants' motion for JNOV stated in pertinent part:

> At the trial, there was testimony by Plaintiffs' engineer [sic] that the cause of flooding on Plaintiffs' property was the elevation of the drain pipe and the road culvert. There was also evidence that the Drain Commissioner constructed the drain pipe. Plaintiff further presented evidence that the flooding damaged their basement and deprived them of its full use. The evidence as to these issues was certainly conflicting. However, the jurors accepted Plaintiffs' evidence and all the reasonable inferences drawn from it and found in Plaintiffs' favor. This Court cannot substitute its judgment for that of the jury when reasonable minds could differ as to whether Plaintiffs have proven the claim of trespass nuisance.

We review a trial court's decision regarding a directed verdict motion de novo. *Derbabian v S & C Snowplowing, Inc,* 249 Mich App 695, 701; 644 NW2d 779 (2002). In doing so, we examine the evidence and all reasonable inferences that may be drawn from it in the light most favorable to the nonmoving party. *Clark v Kmart Corp,* 465 Mich 416, 418; 634 NW2d 347 (2001). In a pre-*Pohutski* case, this Court stated that trespass-nuisance is a "trespass or interference with the use or enjoyment of land caused by a physical intrusion that is set in motion by the government or its agents *and resulting in personal or property damage.*" *CS&P, supra* at 145 (emphasis added).

The house on the property at issue was built in 1978 or 1979. The Fiedor Ferris Drain was installed in 1986, at the request and on petition of five households, including Ferris, who was a predecessor owner of the property plaintiffs eventually bought. The Cusmeyer family, who sold the house to plaintiffs, lived in the house from February 1991 until 1996. In 1993, these owners complained of flooding problems, and the county had a survey conducted. The 1993 survey found various problems with the drain system, including that the pipe tilted back toward the Cusmeyer property rather than in the opposite direction.

Plaintiffs testified that after they bought the house from the Cusmeyers in 1996,[3] approximately half of their backyard was flooded for two years, and that they could use the basement and utility room only to wash clothes because of water seepage into the basement, the consequent smell, etc. Plaintiffs testified that they could not mow their back lawn during those two years, and that they could not use the backyard because the ground was so saturated that they would sink in if they walked on it. They testified that the water in the basement had caused their

[3] The sellers' disclosure statement pertinent to plaintiffs' purchase of the house disclosed that there were drainage problems and water in the basement during periods of above normal precipitation. The disclosure statement explained the drainage problems by stating "Fiedler [sic]/Ferris county drainage system installed improperly."

furnace to rust out, and that they had to put their washer, dryer and water conditioner up on cinder blocks. Plaintiffs testified that after the two year period, the flooding recurred.

Defendant Drain Commissioner Cosens and others testified that the water in the Fiedor Ferris Drain was supposed to flow in a southeasterly direction, but that the northern end of the drain was 4/10' *lower* than the southern end. Cosens also testified that the outlet to the drain system "could be better," did not provide a good outlet for the water, and that it was true that in certain circumstances the lower level could flow to the upper level. Cosens was elected Drain Commissioner in 1988 and took office in 1989, after the Fiedor Ferris Drain was built in 1986. He testified that, from available records, he gathered that no engineer had been consulted or involved in the building of the Fiedor Ferris Drain, that the drain had been "built off a survey," and that "it was done relatively as inexpensive as possible."

Plaintiffs' witness Michael Robinson, owner of an earth moving company, testified that he had been in the excavation business for twenty-five years and that his business included installing storm systems, sanitary sewers, and making drains and ditches. Robinson testified that in his business he has changed drains to make them work better. He testified that he investigated plaintiffs' property in December 1998 and measured elevations by laser, including elevations of the pipes in the drain system at issue. He testified that the pipe flows right to left and has a negative grade, i.e., has a back flow. Robinson testified that he saw water marks on the outer walls of plaintiffs' house when he investigated the property in December 1998, and that the water marks were fresh, i.e., dead grass and leaves had floated to the rim of the marks. Robinson testified that the water marks could not have dated from before the drain was built in 1986. Robinson testified that "the outlet pipe is higher than the . . . spot in the person's [plaintiffs'] yard which would hold the water." He testified that before the water actually got to the mouth of the pipe to drain, it would reach within twenty feet of plaintiffs' house because of the negative grade in the pipe, that it was not an adequate draining system, and that the flow and the outlet need to be corrected to take the water away from plaintiffs' property.

Defendants' expert engineer, Darwin McLeod, testified that his company was asked to examine the drain system in 1993, that the pipe that brought water to the plaintiffs' property was flat, and that the drainpipe that was supposed to take water away from the property was pitched backward, i.e., the end of the pipe was about five inches higher than the beginning. McLeod opined that nevertheless, the second pipe provided better drainage than had there been no pipe, and that the drain did not cause plaintiffs' problem, but rather, excessive rain and new development in the subdivision causing greater runoff did. On cross-examination, McLeod testified:

> *Q.* Okay. I'm going to show you a document. Do you recognize this document – this piece of paper?
>
> *A.* Uh-huh. Uh-huh.
>
> *Q.* What is this?
>
> *A.* It's a document that I signed saying that I was competent to testify in the above matter.

Q. Did you sign that under oath?

A. I did. Uh-huh.

Q. All right. Number 4, it is evident that there is inadequate outlet for the surface water runoff of the pond. Did you say that –swear under oath that that was true?

A. That's right.

Q. Thank you. Did you also say if the pond was extended downstream to a positive outlet in the Roods Lake and Evans drain, then I believe this property would be drained? Did you say that under oath?

A. Does it say pond, yes. Uh-huh.

Q. And you said pond?

A. Uh-huh.

Plaintiffs' counsel argued in rebuttal closing argument:

Mr. Seidlein [defendants' counsel] said that the condition is much better now than it was before. There is no credible evidence as to, as to that. In fact the house was built in 1978. There was no complaint ever filed until 1986 and shortly thereafter, in 1993, they said there's something wrong.

Now, the reason there's something wrong is that's what – that drain is improperly installed. I don't care what they say. It's flowing in the wrong direction. It's funneling to my client's property. All the testimony is from the north pipe all the way to where this water's supposed to go. It's flat. There is no drop. There is no drain. I mean a child in the, in the – playing in the sand on the beach knows if you dig a hole, that the water will drain then. It's all flat. It's flat and Mr. Cosens testified it's flat and now the problem is there is a pipe funneling down close to my client's property. It was not there before.

Now, why was this drain installed? It was installed to relieve the problems. They installed it properly [sic improperly] and they did not relieve the problem and remember no engineering studies. No outlet. How could you build a drain with no outlet and say that we improved your property.

* * *

I think that you saw that – you can look at the maps and the elevations and this and that and you'll . . . you'll see that, that this house was built on the proper levels. The only problem is that the pond overflows. You'll see that, that pipe should not be way up there and with – what that's doing, that's directing the, the water onto our, our property and maybe, maybe there's no other complaints by

> nobody [sic] because all of their water is coming onto the Horning property and to, to go and make a petition we'd be very happy to do. You need five people.
>
> We're the only people that have the problem because the installation of the drain funnels all the water onto our property. The pipe is too high. It's pointed in the wrong direction. The pipe should be lower in the ground and the, the entire drainage should be ditched down with a proper flow to a proper outlet and that's the problem that they created.
>
> The construction of that drain was supposed to alleviate our problem and by checking all the maps, you can see that they intensified the problem and really created the problem.

The trial court's instruction to the jury on trespass-nuisance, agreed to by both counsel, was:

> Now, we get down to the specific theory in this case. The Plaintiffs, Mr. and Mrs. Horning, have brought this case on a theory that the law calls trespass nuisance. Under that theory, the Plaintiff, Mr. and Mrs. Horning, have to prove –they have the burden of proving that the use and enjoyment of their land was interfered with by flooding and that the flooding was caused by or in the control of the Defendant, John Cosens, the Drain Commissioner and the Drainage District.
>
> Now, in order for you to find that those Defendants controlled that flooding, you have to find and the Plaintiffs have the burden of proving that the Defendant either created the flooding, owned or controlled the property from which the flooding arose or employed others to do work there that they knew was likely to cause flooding.

The jury heard testimony that in 1986, five households petitioned for relief from flooding problems, and that as a result, the Ferris Fiedor Drain was constructed. The jury heard testimony from defendant Cosens, who took office in 1989, that the only household he received complaints from relative to the drain system after he took office was the Cusmeyers, the family that sold plaintiffs the instant property. The jury also heard testimony that the drain tilted in the wrong direction and that it could bring water from the intended outlet to the pond on plaintiffs' property. The jury could have inferred from this testimony that before the drain was installed, five households were adversely affected by flooding, but after the drain was installed only one property was flooded—that being plaintiffs' property, and that the extent of the flooding of plaintiffs' property was worsened by virtue of the faulty installation of the drain system as a result of the pipes being tilted toward plaintiffs' property, rather than away from their property.

We conclude that plaintiffs offered evidence from which the jury could infer that they suffered damage due to the drain system bringing additional water to their property due to the improper elevations of the pipe.

III

Plaintiffs' cross-appeal challenges the court's denial of expert witness fees for two witnesses.[4] The trial court granted expert witness fees for plaintiffs' witness Navarre, but denied them for Cobb and Robinson. Defendants had objected to expert witness fees for Cobb and Robinson on the basis that "neither of these individuals were qualified and accepted by the Court as 'expert witnesses.'"

The question whether a particular witness qualifies as an expert witness is reviewed for an abuse of discretion, *Grow v WA Thomas*, 236 Mich App 696, 713; 601 NW2d 426 (1999), as is the trial court's determination regarding expert witness fees, *Haberkorn v Chrysler Corp,* 210 Mich App 354, 380; 533 NW2d 373 (1995). Under MRE 702, "a person may be qualified as an expert witness by virtue of his knowledge, skill, training, or education in the subject matter of the testimony." *Grow, supra* at 713. "Michigan has long endorsed a broad application of these requirements for qualifying an expert." *Id.*

Defendants argued below that the statutory and common law authority to pay expert witnesses more than the standard daily witness fee "does not extend to fact witnesses." Plaintiffs' counsel argued in response that there is no requirement in the Court Rules that an expert be received, qualified or declared by the court to be an expert, but rather that the court rules require that an expert have the necessary knowledge, skill, experience, training or education such that their specialized knowledge will assist the trier of fact in understanding an issue. Plaintiffs argued that if an individual has such experience or training, he may offer testimony in the form of an opinion, citing MRE 702.[5] Plaintiffs argued that both experts had specialized training or experience in drains, Robinson being the owner of a drain construction firm, and Cobb a wetland consultant, that each testified to his training and relevant experience, each offered his opinion that the drain was improperly installed or maintained, and that the configuration of the drain was causing the flooding and making it worse than if defendants had installed and maintained it properly. Plaintiffs argued that if an opposing party seeks to exclude opinion testimony, he must object, that defendants did not object to either witness and that absent objection the issue whether the individual was qualified to offer opinion testimony is waived.

The trial court's opinion on motions for costs and expert witness fees stated:

> As to Plaintiffs [sic] request for expert witness fees, the Court has discretion as to whether to qualify a witness as an expert. Dupree v Malpractice Research, 179

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[4] Plaintiffs' brief on cross-appeal also challenged the trial court's jury instructions related to damages. However, at argument plaintiffs withdrew their request for affirmative relief on this basis.

[5] MRE 702 provides:

> If the court determines that recognized scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

> Mich App 254. Many people give opinion testimony as to various matters but do not qualify as experts witnesses. This Court believes that in order to tax the cost of an expert witness, it is necessary to qualify a witness as an expert so that the opposing party has notice and an opportunity to challenge the qualifications. This was not done as to witnesses Cobb and Robinson; therefore, their fees may not be taxed.

The trial court's concern that defendants have opportunity to challenge the qualifications of the two witnesses at issue was not well-founded. Plaintiffs' witness list identified Robert Cobb as a "Wetlands Expert," and also listed a "Drain Contractor/Excavator (Expert) Name presently unknown." Plaintiffs filed a supplemental witness list stating Robinson's name and address at Mid State Construction and indicating he was a "potential expert." Plaintiffs' responses to defendants' summary disposition motion referred to Cobb as "plaintiffs' wetlands expert" and to Robinson as plaintiffs' "other expert." Defendants' supplemental brief in support of their summary disposition motion referred to Cobb as "plaintiff's own expert witness."

At trial, the court referred to Robinson as "plaintiff's expert" before plaintiffs called Robinson. Plaintiff elicited from Robinson that he had owned an earth moving company called Mid-State Construction since 1993, had been in the business for twenty-five years, that his business included installing storm systems and sanitary sewers, and that that included making ditches and drains. Robinson testified that he inspected plaintiffs' property and opined that the outlet pipe needed to be lower, there was inadequate outlet for the drain, and the flow needed to be corrected in order to take the water away from plaintiffs' property. Plaintiffs' counsel did not specifically request that Robinson be qualified as an expert, and defendants' counsel did not object at any time to Robinson's testimony or request to voir dire him on any issue.

Plaintiffs' counsel called Cobb to the stand by saying "I'd like to call Mr. Robert Cobbs [sic], our wetland expert. . ." Plaintiffs' counsel questioned him regarding his education and experience and his curriculum vitae was admitted into evidence, without objection. However, defense counsel objected numerous times to Cobb's testimony on the basis of lack of foundation. For example, defense counsel objected when Cobb was asked what would be the proper tilt of the drain pipe. The court at that point questioned Cobb and elicited that Cobb had no information or qualifications regarding the construction of this drain.

The sum and substance of Cobb's testimony was that he did soil tests of plaintiffs' property, determined that there were hydric soils present, i.e., soils that had been water-saturated for extended periods, and that based on those tests and his observations of plaintiffs' property, it appeared that the soils were hydric because of the property being flooded for a substantial period without being drained. Cobb testified that the water level on the property appeared to have been higher than the pipe's level for a substantial period. He testified that the drain should have a functioning outlet and it should not overflow above the level of the drain.

As to Robinson, expert witness fees should have been awarded, given that defendants had ample notice that he would testify, and defendants' lack of objection to his qualifications and his testimony, opinion and otherwise. For the trial court to rule post-trial that Robinson was not qualified to be an expert seems unfounded. That is not the case with Cobb; defendants objected repeatedly and the court sustained many of defendants' objections to Cobb's testimony.

IV

Finally, the trial court correctly granted a directed verdict in favor of defendants on plaintiffs' inverse condemnation claim. Establishing an inverse condemnation claim requires proof that governmental action "has permanently deprived the property owner of any possession or use of the property." *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 89; 445 NW2d 61 (1989); *Charles Murphy, MD, PC v Detroit*, 201 Mich App 54, 56; 506 NW2d 5 (1993). Plaintiffs' proofs did not reasonably support a conclusion that water runoff from the drain permanently deprived them of any part of their property.

We affirm the judgment, and reverse the trial court's denial of expert witness fees as to Michael Robinson. In all other respects, we affirm. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Barbara B. MacKenzie